

May 9, 2012

Rod Sinks
10949 Maria Rosa Way
Cupertino, CA 95014

Re: Your Request for Informal Assistance
Our File No. I-12-056

Dear Mr. Sinks:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Our advice is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is limited to the provisions of the Act, and we do not analyze other conflict of interest rules such as common law conflict of interest or Government Code Section 1090. Because your questions are general in nature, we are providing informal assistance.²

QUESTIONS

You ask a number of discrete questions relating to your ability to make, participate in making, or to influence the making of decisions by the Cupertino City Council. We list those questions below, provide an Analysis that outlines the provisions of the Act governing the questions you raise, and will answer the questions in the Discussion that follows the Analysis.

- 1) May you participate in discussions and decisions on general plan allocation, increases or set-asides of land for commercial purposes? For example, the Main Street development project proposal includes substantial new office space that would draw down the limited remaining allocation for office space in the City's general plan. Apple Inc, (Apple) has argued that any amount allocated for Main Street would be tied up for 5 years if the applicant's request is honored, and that such allocation should not take away from the existing pool, but rather that the pool should be

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

- increased. The office allocation for Apple is part of this pool. So this question will also be part of the City Council's upcoming consideration on the Main Street project, and you request guidance on your ability to participate in the May 15 decisions on the proposed mixed-use Main Street development project;
- 2) May you participate in discussions and decisions on development of properties that may later be rented by Apple? For example, the Main Street development project will come before the City Council on May 15. It is a large, mixed use development on 17 acres with many elements including retail, senior housing, hotel, and office. The developer intends to build the office space on "spec," but Apple may decide it would like to use some of that space;
 - 3) May you participate in discussions and decisions on development of properties currently rented by Apple?
 - 4) The City has started its budgeting and prioritization process for 2012-13, and a number of questions have come up regarding allocation of city resources to various projects, including those in which Apple has or may have a direct or indirect interest. You ask whether you may participate in the City's budget process. You ask in addition whether, if you have a conflict of interest in a particular budget decision, it might be possible that the City's budget decisions can be "segmented" to allow your participation in those decisions in which you do not have a conflict of interest.
 - 5) Apple owns and leases property throughout the City of Cupertino. Does your wife's employment or stock ownership create an economic interest in Apple's real property interests? Specifically, do you have a conflict of interest in a City Council decision on real property located within 500 feet of the boundary of property owned or leased by Apple?
 - 6) Finally, you ask whether the "public generally" or any other exception applies under Regulation 18707.1 (b)(1)E.

FACTS

You are a member of the City Council of the City of Cupertino. Your wife is a regular, full-time employee of Apple, a translator working in software localization as an individual contributor. She has no involvement in budget or real estate decisions. Your current holdings of Apple stock are 183 shares of common stock, which at current market price of \$610 per share are worth approximately \$112,000.

Apple is a Fortune 500 company. It is the city's largest employer, occupying some 60 buildings in the area, and is the largest source of tax revenue to the city. Cupertino has a large number of businesses within its borders, and there are numerous development projects in the city. You have attached the city's latest Development Activity Report for our reference.

The Apple Campus 2 project and the Apple Cafeteria project are expected to come before the City Council later this year. The Campus 2 project will provide a large increase to Apple's office space within the City, which you believe is designed to meet Apple's needs for the foreseeable future. You will recuse yourself when these projects come before the City Council; they are not matters on which you request advice. Rather, you ask whether you can participate in other matters that will come before the council on May 15.

When the City Council meets on May 15, you anticipate that it will make decisions on the Main Street development project. Its developer, Sand Hill Properties, seeks approval to build on roughly 17 acres within the City. It received approval on an old plan in 2009, but is now requesting changes. The revised plan is a mixed use project including hotel, retail, and office space. The proposed office space is 300,000 square feet. The old plan reserved 100,000 square feet of office space out of the City's general office space pool. There is only 120,000 square feet remaining in that pool, so even if the City Council were to dedicate the entire remaining amount to this project, the City would still be roughly 80,000 square feet short of the office space now requested by Sand Hill. The City Council could increase this pool with a general plan amendment, but that would require an Environmental Impact Review to study traffic implications across the city, which will take an estimated 9 months.

Sand Hill is eager to get started, but may elect to hold off development of part of the office space for the 9 months it will take to do the EIR. Alternatively, Sand Hill could ask for an allocation out of a separate office space pool held for those companies that provide significant fiscal impact to the City. That was Sand Hill's intention at the time it went before the Planning Commission last month, when it sought 200,000 square feet out of this major employers' pool, which currently holds 622,000 square feet. The wording is unclear on criteria for qualification for draw from the major employers' pool, but Apple is one company that qualifies without dispute, and at the Planning Commission's meeting, Apple expressed concern over permitting Sand Hill to reserve a third of the major employers' pool. This 622,000 square foot pool is adequate to meet both Main Street and Apple's announced needs, but you believe Apple would prefer to avoid unnecessary constraints should it require more office space in the future.

At the May 15 meeting, you believe Sand Hill may pursue one of two approaches to the office-space allocation problem. It may ask the council to consider allocation out of the general office space pool, which means Sand Hill would have to wait to build out part of the project. Alternatively, if Sand Hill does not wish to wait, it would have to ask for allocation out of the major employers' pool, a course of action for which Apple has expressed reservations.

You do not know the potential cost to Apple, if any, should the City Council decide to allocate 200,000 square feet to Sand Hill from the major employers' pool, when the 422,000 square feet that would remain in that pool are sufficient to satisfy Apple's announced plans.

The City has also started its budgeting and prioritization process for 2012-13, and a number of questions have come up regarding allocation of city resource to various projects, including those in which Apple has or may have a direct or indirect interest. You want to know the extent to which you can participate in the City's budget process. If you have a conflict of interest in particular budget decisions, you ask for guidance on whether or how "segmentation"

might permit you some participation in these decisions. For example, could the City Council structure its deliberations so that non-Apple priorities are decided first, permitting you to return to the meeting for discussion and voting on the final budget?

ANALYSIS

We begin with a general discussion of the Act's conflict of interest provisions, insofar as they bear on the circumstances you describe. Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether a person has a disqualifying conflict of interest in a governmental decision, which we will follow in answering your questions.

Step One: Are you a "public official" subject to the Act's conflict-of-interest rules?

The Act's conflict-of-interest rules apply only to "public officials." (Sections 87100, 87103; Regulation 18700(b)(1).) A "public official" is "every member, officer, employee or consultant of a state or local government agency . . ." (Section 82048.) As a member of the City Council, you are a "public official" within the meaning of the Act.³

Step Two: Would you be making, participating in making, or using your official position to influence a governmental decision?

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official "participates in a governmental decision" when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.) Your questions are focused on participation in a variety of decisions coming before the City Council, and we therefore proceed to the next step of our

³ If a public official's office is listed in Section 87200, which specifically includes city council members, and the official has a conflict of interest in a decision noticed at a public meeting, the official must: (1) verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting and immediately prior to the discussion of the item; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences, and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5 subdivisions (c) and (d) apply. (Section 87105.)

analysis, assuming you will (to the extent permissible under the Act) be making, participating in making, or influencing governmental decisions before the City Council.

Step Three: What are your economic interests?

Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official’s economic interests, described as follows:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Regulation 18703.1(b)).
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An economic interest in a source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- An economic interest in a source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An economic interest in his or her personal finances, including those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

You advise us that you own stock in Apple worth approximately \$112,000. Under Section 87103(c) and Regulation 18703.1(a), you therefore have an indirect investment interest in that business entity, specifically a direct or indirect (community property) interest in Apple stock worth \$2,000 or more. Your account of the facts also suggests that you have an economic interest in Apple as a source of income amounting to \$500 or more over the past 12 months; assuming that your wife has received \$1,000 or more in income from Apple over that period, your community property interest in that income is \$500 or more. (Section 82030(a) and Regulation 18703.3(a).)

Finally, a public official always has an economic interest in his or her personal finances. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.) Your account of the facts does not clearly indicate whether any of the decisions coming before the City Council might have a distinct effect on your personal finances, so we will not discuss that matter further.

But you should be aware that you could have a conflict of interest in *any* governmental decision that might affect your economic interest in your personal finances.⁴

Step Four: Are your economic interests directly or indirectly involved in the decision?

Regulation 18704.1 specifies the circumstances under which a business entity and/or source of income is deemed “directly involved” in a decision, as follows:

“(a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.

(b) If a business entity, source of income, or source of a gift is directly involved in a governmental decision, apply the materiality standards in California Code of Regulations, Title 2, section 18705.1(b), section 18705.3(a), or section 18705.4(a), respectively. If a business entity, source of income, or source of a gift is not directly involved in a governmental decision, apply the materiality standards in California Code of Regulations, Title 2, section 18705.1(c), section 18705.3(b), or section 18705.4(b), respectively.”

Business entities and sources of income that are not directly involved in governmental decisions are regarded as *indirectly* involved. (Regulations 18704.1(b), 18705.1(a)(2), and Regulation 18705.3(b).)

⁴ Regulation 18705.5 (a) provides: “A reasonably foreseeable financial effect on a public official's or his or her immediate family's personal finances is material if it is at least \$ 250 in any 12-month period. When determining whether a governmental decision has a material financial effect on a public official's economic interest in his or her personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest shall be considered.” Possible effects of a governmental decision on the value of an official's real property interests are not considered “personal financial effects” because effects of a decision on an official's real property interests are a separate basis for a conflict of interest in decisions that may affect the value of an official's real property. You have not mentioned a real property interest in your account of the facts, and we have therefore not discussed possible conflicts of interest arising out of effects on that kind of economic interest.

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on your economic interests?

1. Materiality

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interests is "material." (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the agency's decision.

Any financial effect on a business entity *directly* involved in a governmental decision is presumed to be "material." The presumption may be rebutted by proof that it is not reasonably foreseeable that the decision will have *any* financial effect on the business entity; an alternative materiality standard is available when the official's investment interest is worth less than \$25,000. (See Regulation 18705.1(b), copy enclosed).

When the official has an economic interest in a source of income that is a business entity *indirectly* involved in a governmental decision, a "material" effect is determined under Regulation 18705.1(c). The standards for materiality under this regulation vary with the size of the business. Apple is a Fortune 500 company and is traded on the New York Stock Exchange.⁵ The materiality standards applicable to a Fortune 500 company that is not directly involved in a governmental decision are the following:

"(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year of \$10,000,000 or more; or

"(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500,000 or more; or

"(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$10,000,000 or more."

2. Foreseeability

As noted above, the Commission does not act as a finder of fact in its advice letters. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (See *In re Thorner*, (1975) 1 FPPC Ops. 198.) Because determination of the foreseeability of material financial effects is an unavoidably factual question, we must leave this ultimate determination to the public official and his or her counsel. A material financial effect on an economic interest is

⁵ Regulation 18705.1(c) provides: "If more than one of the following subdivisions is applicable to the business entity in question, apply the subdivision with the highest dollar thresholds."

“reasonably foreseeable” if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) However, an effect need not be certain to be considered “reasonably foreseeable,” but it must be more than a mere possibility. (*In re Thorner, supra.*)

3. *Segmentation*

A public official who is disqualified from one more decisions within a series of related decisions may participate in the remaining decisions to the extent the official’s participation does not affect any decision or decisions in which he or she has a conflict of interest. (*In re Owen* (1976) 2 FPPC Ops. 77.) Specifically, the official may participate in making decisions in which he or she has no conflict of interest, if the decisions in which the official does participate cannot effectively determine, affirm, nullify, or alter the result of any decision in which the official may not participate due to a conflict of interest. Most commonly, the official avoids disqualification from an entire series of decisions when the votes are “segmented,” arranged in a manner that ensures that the decisions which pose a conflict of interest are finally and fully decided without participation by the affected official.

Regulation 18709 provides the rules for the “segmentation” of a governmental decision:

“(a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

“(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of or otherwise financially affect, the decision from which the official was disqualified.

“(b) For purposes of this regulation, decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.”

Steps Seven and Eight: Public Generally & Legally Required Participation

Even if an official has a conflict of interest, disqualification is not required if the governmental decision affects the public official’s economic interests in a manner that is indistinguishable from the manner in which the decision will affect the public generally. (Section 87103; Regulation 18707(a).)

Additionally, in certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the “legally required participation” exception. This exception applies only in certain very specific circumstances where the government agency would be unable to take any action due to the absence of a voting quorum. (Section 87101; Regulation 18708.)

DISCUSSION

Question 1.

It appears that you are a public official subject to the Act’s conflict-of-interest rules, that you will be making, participating in making, or may use your official position to influence the outcome of City Council votes on the Main Street project, and that you have an economic interest in Apple, a business entity indirectly involved in decisions on the Main Street project, at least in decisions that relate to Sand Hill’s application for additional office space, to which Apple has voiced opposition.

We are now at Steps Five and Six of the legal Analysis, where the apposite questions are whether the grant or denial of Sand Hill’s application for additional office space will have a reasonably foreseeable material financial effect on Apple. So long as Apple is neither a party to, nor the subject of, decisions on this topic, Apple’s involvement in such decisions is indirect, and the materiality thresholds applicable to Apple are those given in Step Six, on page 7 above.

As we understand your account of the facts, Apple does not have a known, specific plan to build or lease office space in quantities beyond the 422,000 square feet that would remain even if Sand Hill’s application were granted. Apple may have voiced opposition to Sand Hill’s request for 200,000 additional square feet of office space, but it did not indicate whether its position is based on a general policy to maximize available space for possible future use, or that the allocation of this space to Sand Hill would result in foreseeable costs to Apple – for example, by requiring it to take space in nearby cities – or that it is reasonably foreseeable that such costs would equal or exceed the materiality thresholds given in Regulation 18705.1(c). As long as this remains true on May 15, it does not appear that decisions on the Sand Hill application will have a reasonably foreseeable financial effect on Apple, or that any foreseeable effect would foreseeably reach a materiality threshold that would require you to recuse yourself from decisions on this project.

Question 2.

The answer here is much the same as the answer to Question 1. Here you indicate that Apple might wish to lease some of the office space to be built by Sand Hill. You may still participate in decisionmaking on the Sand Hill project, so long as it is not reasonably foreseeable that these decisions would have a material financial effect on Apple. Nothing in your account of the facts suggests that this would be the case.

Question 3.

You may participate in decisions relating to development of properties currently rented by Apple so long as it is not reasonably foreseeable that such decisions would have a material financial effect on Apple. Apple of course would have an economic interest in such properties by virtue of its leasehold, but so long as Apple did not initiate the proceeding, and is not the subject of the proceeding, it is not directly involved in the proceeding and the materiality standard remains the same as specified at Regulation 18705.1(c). Regulation 18704.1 (copy enclosed), describes the circumstances under which a person, including a business entity or source of income, can be said to be the “subject” of a governmental decision, and therefore would be directly involved in the decision. So long as Apple is neither the person that initiates a decision relating to property leased by Apple, and is not the subject of any such decision, you may participate in such decisions if it is not reasonably foreseeable that the decision would have a material financial effect on Apple.

Question 4.

As we noted in an earlier e-mail communication, it is not possible for us to offer *detailed* advice on how to “segment” decisions relating to the City’s budget in a manner that would permit you to participate in budget decisions. But our general discussion of the process on page 8 above should equip you with sufficient information to order or arrange budget decisions so that any and all decisions in which Apple has a direct or indirect interest are fully and finally decided before you return to the dais to participate in remaining agenda items for which the Council’s decisions will not effectively determine, affirm, nullify, or alter the result of previous budgetary decisions in which you had a conflict of interest. The only limitation on the “segmentation” procedure is the practical challenge posed by some decisions that by their nature cannot be broken down into meaningful sub-decisions that can be fully and finally decided by an official who has a conflict of interest at critical points in the decisionmaking process.

Question 5

You next ask whether your wife’s employment by Apple, or her ownership of Apple stock, creates an ownership in real property owned or leased by Apple. Section 82033 defines what is meant under the Act by “Interest in Real Property.” In pertinent part, it provides that:

“Interests in real property of an individual includes a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10 percent interest or greater.”

As we understand your account of the facts, neither you nor your wife has a ten-percent ownership interest in Apple. If this is correct, Apple’s real estate interests are not considered economic interests of you or your wife. Thus, you will not have a conflict of interest (based on

your *own* economic interest in real property) in a City Council decision affecting real property located within 500 feet of the boundary of property owned or leased by Apple.

Question 6.

You also ask whether you might participate in City Council decisions involving Apple under the “public generally” exception under Regulation 18707.1 (b)(1)(E). That subdivision expands the basic public generally exception to the Act’s conflict of interest rules, as follows:

“(E) Exceptional Circumstances. The decision will affect a segment of the population which does not meet any of the standards in subsections (b)(1)(A) through (b)(1)(D), however, due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally.”

As you know, the Act’s “public generally” provisions, described in detail at Regulations 18707 through 18707.10, permit an official to participate in a governmental decision whenever the reasonably foreseeable effects of the decision on the official are indistinguishable from the reasonably foreseeable effects on “a significant segment” of the population of the jurisdiction. This question suggests that you believe the “public generally” rule would not permit you to participate in decisions involving Apple, unless it is shown that “exceptional circumstances” dictate otherwise.

In general, exceptions to a broad statutory mandate are construed narrowly. You have not described the exceptional circumstances we might consider to find that a decision involving Apple would affect a significant segment of the public in a manner indistinguishable from its effects on the public generally. We cannot advise you on this question, or indeed on the utility of any similar exception, without information on the “exceptional circumstances” you believe might constitute a basis for invoking the exception.

If you have other questions, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Lawrence T. Woodlock
Senior Counsel, Legal Division

LTW:jgl